

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Bruce Schwichtenberg and  
Schwichtenberg for Senate,

Complainants,

vs.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
ORDER**

Julianne Ortman, Ortman for Senate  
Committee,

Respondents.

The above-entitled matter came on for an evidentiary hearing on August 31, 2012, before a panel of three Administrative Law Judges: Richard C. Luis (presiding judge), James E. LaFave, and Kirsten M. Tate. The hearing record closed on September 14, 2012, with the filing of the Complainants' reply brief.

Bruce Schwichtenberg, (Complainant) appeared on his own behalf and on behalf of Schwichtenberg for Senate without counsel. He was assisted by his wife, Darlene Schwichtenberg.

John A. Knapp and Tammara Diehm, Winthrop and Weinstine, appeared on behalf of Senator Julianne Ortman and Ortman for Senate Committee (Respondents).

**STATEMENT OF THE ISSUE**

Did Respondents violate Minn. Stat. § 211B.02 by using the word "Republican" on Senator Ortman's campaign lawn signs and other campaign material?

The panel concludes that the Complainants have failed to establish by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.02 and the Complaint is therefore dismissed.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

## FINDINGS OF FACT

1. The Complainant, Bruce Schwichtenberg, and Respondent State Senator Julianne Ortman, were Republican Party candidates for the Minnesota Senate District 47 (Carver County) seat in the August 14, 2012, primary election.

2. Senator Ortman is the incumbent Republican candidate and has served in the Minnesota Senate for approximately 10 years. She was first elected to represent Carver County in the Minnesota Senate in 2002 (District 34). She was re-elected in 2006 and again in 2010. Senator Ortman is a member of the Senate Republican Caucus and currently serves as Deputy Majority Leader in the Senate.

3. At the May 2012 endorsing convention, Senate District 47 Republicans made the decision not to endorse either Senator Ortman or Mr. Schwichtenberg for the Senate seat as both candidates failed to obtain the necessary 60 percent of the votes after five rounds of balloting.<sup>1</sup> As a result, neither the Complainant nor Senator Ortman had the endorsement of the Republican Party in the August 14, 2012, primary contest.<sup>2</sup>

4. The decision by Senate District 47 Republicans not to endorse a candidate was widely reported in the press. For example, the *Star Tribune*, Minnesota Public Radio, MinnPost, and the *Chaska Herald* all reported on Senator Ortman's failure to win the Republican Party's endorsement in her re-election bid.<sup>3</sup>

5. The state primary election is a partisan election. Voters may vote for candidates of only one political party.<sup>4</sup>

6. Prior to the primary election, Respondents posted campaign lawn signs throughout the district promoting Senator Ortman's candidacy. The campaign signs had two designs. One version of the sign stated:

Vote August 14  
Julianne Ortman  
Republican for Minnesota Senate

The other stated:

Julianne Ortman  
Republican for State Senate

7. Some of the campaign signs Respondents posted were signs Respondents had used previously in prior elections when Senator Ortman had the Republican Party's endorsement.<sup>5</sup>

---

<sup>1</sup> Respondents' Ex. 4.

<sup>2</sup> Respondents' Ex. 4.

<sup>3</sup> Respondents' Ex. 4.

<sup>4</sup> See, Minn. Stat. § 204D.08.

<sup>5</sup> Respondents' Ex. 3 (Transcript of August 7, 2012, Probable Cause Hearing at 15.)

8. The Respondents also prepared and disseminated other campaign material, such as postcards and newspaper advertisements that included statements encouraging voters to vote for “Republican State Senator Julianne Ortman.”<sup>6</sup>

9. Senator Ortman participated in the preparation of her campaign lawn signs and other campaign material.<sup>7</sup>

10. Senator Ortman defeated Mr. Schwichtenberg in the primary election. She received 2,114 votes (58%) and Mr. Schwichtenberg received 1,504 votes (42%). Senator Ortman will face Democrat James Weygand in the general election on November 6, 2012.

11. The Minnesota Secretary of State’s Office estimated the voter turnout at the August 14<sup>th</sup> State primary election to be 9% of the eligible voters in the state.

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minn. Stat. § 211B.02 provides:

#### **211B.02 False Claim of Support.**

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

3. The burden of proving the allegation in the complaint is on the Complainants. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.<sup>8</sup>

4. The Complainants have failed to establish by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.02 by knowingly making a false claim implying Senator Ortman had the endorsement of the Republican Party of Minnesota.

---

<sup>6</sup> Complainants’ Exs. 1 and 2.

<sup>7</sup> Respondent’s Ex. 3 (Transcript of August 7, 2012, Probable Cause Hearing at 13).

<sup>8</sup> Minn. Stat. § 211B.32, subd. 4.

5. It is appropriate to deny Complainants' August 28, 2012 request to amend the Complaint to add a violation of Minn. Stat. § 160.2715.

6. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

## **ORDER**

### **IT IS ORDERED:**

The Complaint is **DISMISSED**.

Dated: September 19, 2012

/s/ Richard C. Luis  
RICHARD C. LUIS  
Presiding Administrative Law Judge

/s/ James E. LaFave  
JAMES E. LAFAVE  
Administrative Law Judge

/s/ Kirsten M. Tate  
KIRSTEN M. TATE  
Administrative Law Judge

## **NOTICE**

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

The Complainant, Bruce Schwichtenberg, and Respondent, State Senator Julianne Ortman, were Republican Party candidates for the Minnesota Senate District 47 (Carver County) seat in the August 14, 2012, primary election. Neither had the endorsement of the Republican Party.

Prior to the primary election, Respondents prepared and disseminated campaign lawn signs throughout the district that stated:

Vote August 14  
Julianne Ortman  
Republican for Minnesota Senate

or:

Julianne Ortman  
Republican for State Senate

The Respondents also disseminated campaign postcards and newspaper advertisements that encouraged voters to vote for “Republican State Senator Julianne Ortman.”

Senator Ortman testified at the probable cause hearing that her intent in identifying herself as a Republican on her campaign material was to inform voters that she was running in the State’s Republican primary and to encourage them to vote for her. Senator Ortman insists that it was never her intent to imply that she had the endorsement of the Republican Party.

Mr. Schwichtenberg argues that Respondents did imply that Senator Ortman had the Republican Party endorsement by using the word “Republican” on her campaign material. Mr. Schwichtenberg points out that Senator Ortman is a seasoned candidate, sitting senator, and attorney. He maintains that Senator Ortman and her committee should have been familiar with the Minnesota Supreme Court decisions holding that that use of the initials “DFL” on campaign material, without modifying language, implies endorsement.<sup>9</sup> By not modifying their own campaign material, Mr. Schwichtenberg contends Respondents knowingly implied Republican Party endorsement. Moreover, Mr. Schwichtenberg asserts that voters in the district were confused as to whether Senator Ortman had the Republican Party endorsement. He stated that he spoke to several people at the Carver County Fair, a few days before the State primary, who mistakenly believed Senator Ortman was the endorsed Republican Party candidate.

Minn. Stat. § 211B.02 provides that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the

---

<sup>9</sup> See, *Schmitt v. McLaughlin*, 275 N.W.2d 587, (Minn. 1979). See also, *In the Matter of Ryan*, 303 N.W.2d 462 (Minn. 1981); and *Daugherty v. Hilary*, 344 N.W.2d 826 (Minn. 1984).

support or endorsement of a major political party. In *Schmitt v. McLaughlin*,<sup>10</sup> the Minnesota Supreme Court held that a candidate's use of the initials "DFL" would imply to the average voter that the candidate had the endorsement of the DFL Party in violation of Minnesota election law. The court explained that, while candidates have a right to inform voters of their party affiliation "by the use of such words as 'member of' or 'affiliated with' in conjunction with the initials 'DFL'," the use of the initials "DFL" without such modifiers falsely implies to the average voter that the candidate is endorsed or at the very least has the support of the DFL party.<sup>11</sup>

The question before the Panel is whether the Respondents violated Minn. Stat. § 211B.02 by knowingly making a false claim implying endorsement by the Republican Party when they used the word "Republican" on Senator Ortman's lawn signs and other campaign material.

The Panel concludes that, unlike the initials "DFL," which uniquely refers to the Democratic Farmer Labor Party, the word "Republican" refers to the political party as well as to a philosophy or a member of that party. The counterpart to the word "Republican" is "Democrat" or "Independent." Candidates and voters typically identify themselves as "Republican," "Democrat" or "Independent." They do not identify themselves as "DFL" or "GOP" or "RPM" (Republican Party of Minnesota). Those initials refer specifically to the political parties.

In *Schmitt v. McLaughlin*, the Minnesota Supreme Court confirmed the right of candidates to inform voters of their party affiliation. However, because the initials "DFL" uniquely signifies the political party, the Court instructed candidates to use modifiers such as "member of" in conjunction with the initials "DFL" to reflect party affiliation rather than party endorsement.

The Panel concludes that the use of the word "Republican" is distinguishable from the use of the initials "DFL" and does not, standing alone, imply endorsement by the Republican Party. Rather, it signifies membership in or affiliation with the political party. In addition, the Panel notes that, unlike the candidate in *Ryan*,<sup>12</sup> none of Senator Ortman's campaign material at issue in this matter referenced the word "endorsed." Moreover, identifying oneself as a "Republican" was important given that the August 14<sup>th</sup> primary was a partisan contest in which voters could vote only for candidates of one party. As the incumbent Republican candidate in a partisan race, and a senior member of the Minnesota Senate Republican Caucus, Senator Ortman accurately referred to herself as a Republican.

After a careful review of the record, the Panel concludes that the Complainants have failed to show by a preponderance of the evidence that Respondents knowingly implied that Senator Ortman had the Republican Party's endorsement by using the word "Republican" on her campaign lawn signs and other campaign material.

---

<sup>10</sup> 275 N.W.2d 587.

<sup>11</sup> 275 N.W.2d at 591.

<sup>12</sup> 303 N.W.2d 462 (Minn. 1981).

The Panel also notes that Mr. Schwichtenberg alleged in his August 28, 2012, submission that Respondents violated Minn. Stat. § 160.2715 by posting campaign signs within highway right-of-ways. Mr. Schwichtenberg submitted photographs depicting Respondents' campaign signs at various highway locations in the district, and requested that the Panel allow Complainants to amend the Complaint by adding these alleged violations. The Panel's jurisdiction is limited to alleged violations of Minnesota Statutes Chapters 211A and 211B, the Fair Campaign Practices and Finance Act. Because the Panel lacks jurisdiction to consider alleged violations of Minn. Stat. § 160.2715, Mr. Schwichtenberg's request to amend the Complaint is denied.<sup>13</sup>

Finally, the Respondents challenged the constitutionality of Minn. Stat. § 211B.02 arguing that it impermissibly infringes on the exercise of First Amendment rights. As a general rule, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face. An administrative law judge or an agency may properly consider, however, whether a statute is unconstitutional as applied to the particular facts of a case.<sup>14</sup> In *Buettner v. City of St. Cloud*,<sup>15</sup> the Minnesota Supreme Court stated that even when a constitutional issue is involved, the challenged determination of an administrative body may be due judicial deference if "the underlying decision-making process is designed to effectively produce a correct or just result or if the decision is informed by considerable expertise." To the extent that constitutionality, as applied, requires the generation of facts and findings within a particular subject matter area, administrative agencies may render a decision on a constitutional question which would be of assistance to a reviewing court.

Because the panel has determined that the Respondents did not violate Minn. Stat. § 211B.02, there is no need to reach the merits of the Respondents' arguments regarding the constitutionality of § 211B.02. The panel notes only that in a recent challenge to the restrictions on knowingly or recklessly false campaign speech under Minn. Stat. § 211B.06,<sup>16</sup> the Eighth Circuit held that knowingly false campaign speech falls within the protections of the First Amendment's right to free speech and, therefore, any regulation must satisfy the strict scrutiny test: that the restrictions be narrowly tailored to meet a compelling state interest.<sup>17</sup> In *Schmitt v. McLaughlin*,<sup>18</sup> the Minnesota

---

<sup>13</sup> At the evidentiary hearing on August 31, 2012, the Respondents moved to dismiss Complainants' request to amend the Complaint. Because the Panel has denied Complainants' request to amend the Complaint, Respondents' motion to dismiss the request is moot.

<sup>14</sup> G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998). See, e.g., *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *Petterssen v. Commissioner of Employment Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (Minn. 1975); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993).

<sup>15</sup> 277 N.W.2d 199, 204 (Minn. 1979).

<sup>16</sup> 281 *Care Committee v. Arneson*, 638 F.3d 621 (8<sup>th</sup> Cir. 2011).

<sup>17</sup> 638 F.3d at 636. (The court remanded the case to the district court for further proceedings consistent with its order.) In *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590-591 (Minn. 1979), the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 211B.02's predecessor statute (§ 210A.02) holding that since the regulation was directed at false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.

<sup>18</sup> 275 N.W.2d at 590-591.

Supreme Court rejected a facial challenge to Minn. Stat. § 210A.02 (the predecessor to § 211B.02) concluding that since the statute regulates only false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.<sup>19</sup> Whether that decision remains good law in light of *281 Care Committee* as well as the U.S. Supreme Court's recent ruling in *United States v. Alvarez*,<sup>20</sup> is not for this Panel to decide.

Having found that the Complainant failed to show that the Respondents violated Minn. Stat. § 211B.02 by using the word "Republican" on campaign material, the Panel dismisses the Complaint in its entirety.

**R.C.L., J.E.L., and K.M.T.**

---

<sup>19</sup> *Id.*, discussing Minn. Stat. § 210A.02 (predecessor to § 211B.02).

<sup>20</sup> 567 U.S. \_\_\_\_ (June 28, 2012) (Supreme Court overturned law making it a crime to falsely claim to have earned a military decoration as an unconstitutional infringement on First Amendment right to free speech. Court held that First Amendment requires there be a direct causal link between the restriction imposed and the injury to be prevented.)